Sunkyong International Inc v Malaysian Rubber Development Corporation Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03–122 OF 1991
MOHAMED YUSOFF, PEH SWEE CHIN AND EUSOFF CHIN SCJJ
15 MAY 1992

Civil Procedure *— Service — Out of jurisdiction — Relevant paragraphs of O 11 r 1(1) of the Rules of the High Court 1980 not set out in affidavit in support — Whether omission was fatal to application*

Civil Procedure *— Service — Out of jurisdiction — Non-compliance with court rules — Affidavit in support not stating that respondent had good cause of action — Effect of non-compliance*

Civil Procedure *— Service — Out of jurisdiction — Service of third party notice on defendant in USA — No Civil Procedure Convention in USA — Applicable method of service — Rules of the High Court 1980 O 11 r 6(2)*

An action for breach of contract of sale of rubber gloves allegedly bought by the respondent as agent for the appellant, a company incorporated in the United States of America ('USA'), had been instituted in Malaysia. The respondent applied by summons-in-chambers before the registrar for leave to issue a third party notice against the appellant and that the respondent be at liberty to serve the third party notice on the appellant at a specified address in New York, USA through the agents of the respondent in USA. An order was made by the registrar in terms and the appellant applied for the order to be set aside. The application was refused and an appeal to the judge-in-chambers was also dismissed. The appellant appealed to the Supreme Court. On the appeal, apart from the particular procedural point relating to the validity of the order for method of service of notice of writ outside jurisdiction, the appellant raised two other issues: (a) that the relevant paragraphs of O 11 r 1(1) were not set out in the supporting affidavit for leave to issue the third party notice and (b) the failure of the respondent to state in its affidavit that it had a good cause of action.

Held, allowing the appeal in part:

(1) While it was far better to quote section and verse or specific order or rule in any application, it was never fatal to any application to omit to do so where the applicant can bring himself within any relevant specific order or rule. In this case the respondent could and did bring its case under paras (f) and (j) of O 11 r 1(1) of the Rules of the High Court 1980.

(2) The omission to state in the affidavit that the respondent had a good cause of action could not amount to anything more than a mere failure to comply with a rule of the High Court in regard to

A the form and content of an affidavit, an irregularity curable by costs without any need for any amendment therein.

(3) As there was no Civil Procedure Convention in subsistence in the USA, therefore O 11 r 6(2) of the Rules of the High Court 1980 applied and the service of the notice of the writ would have to be effected through the Government of the USA or through the Malaysian consular authority, contrary to what was ordered and done in this case. The order for service out of jurisdiction through agents of the respondent was set aside.

[Bahasa Malaysia summary

Suatu tindakan kerana kemungkiran kontrak penjualan sarong tangan getah yang dikatakan dibeli oleh responden sebagai wakil perayu, sebuah syarikat yang diperbadankan di Amerika Syarikat, telah dimulakan di Malaysia. Responden telah memohon melalui saman dalam kamar di hadapan pendaftar untuk mendapat kebenaran mengeluarkan notis pihak ketiga terhadap perayu dan bahawa responden diberi kebebasan menyampaikan notis pihak ketiga itu kepada perayu di alamat yang tertentu di New York, Amerika Syarikat melalui wakil responden di Amerika Syarikat. Suatu perintah telah dibuat oleh pendaftar seperti yang dikehendaki dan perayu kemudiannya memohon untuk perintah itu diketepikan. Permohonan itu telah ditolak dan rayuan kapada hakim di dalam kamar pun telah dibuang. Perayu telah merayu ke Mahkamah Agung. Dalam rayuan itu, selain dari soal acara tertentu mengenai sahnya perintah bagi cara penyampaian luar bidang kuasa, perayu menimbulkan dua isu yang lain iaitu (a) bahawa perenggan yang berkenaan dalam A 11 k 1(1) tidak disebut di dalam afidavit menyokong permohonan mendapat kebenaran mengeluarkan notis pihak ketiga dan (b) kegagalan responden menyebut di dalam afidavitnya bahawa ia mempunyai kausa tindakan yang sah.

Diputuskan, membenarkan sebahagian rayuan itu:

(1) Sungguhpun adalah jauh lebih baik menyebut seksyen dan rangkap atau aturan atau pun kaedah yang tertentu di dalam mana-mana permohonan, tidak pernah peninggalan berbuat begitu membawa padah pada permohonan itu di mana pemohon boleh membawa dirinya dalam mana-mana aturan atau kaedah yang tertentu. Di dalam kes ini responden boleh dan telah membawa kesnya di bawah perenggan (f) dan (j) A 11 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980.

(2) Peninggalan menyebut di dalam afidavit bahawa responden mempunyai kausa tindakan yang sah tidak bererti lebih daripada hanya kegagalan mematuhi kaedah Mahkamah Tinggi mengenai bentuk dan kandungan afidavit, suatu perkara di luar aturan yang boleh dipulihkan dengan membayar kos tanpa memerlukan apa-apa pindaan di dalamnya.

(3) Oleh kerana tidak terdapat Konvensyen Acara Sivil (Civil Procedure Convention) di Amerika Syarikat, dengan itu A 11 k 6(2)

Kaedah-Kaedah Mahkamah Tinggi 1980 terpakai dan penyampaian notis writ itu hendaklah dilaksanakan melalui Kerajaan Amerika Syarikat atau melalui pihak berkuasa konsular Malaysia, bertentangan dengan apa yang telah diperintahkan dan dibuat di dalam kes ini. Perintah membenarkan penyampaian luar bidang kuasa melalui ejen responden diketepikan.] A B

Cases referred to

1 *Kampong Kuantan Rubber Co Ltd v VKG Menon* [1963] MLJ 332 (overd)
2 *Afro Continental Nigeria Ltd v The Meridian Shipping Co SA* [1982] 2 Lloyd's Rep 241 (refd) C
3 *Vaudrey v Nathan* [1928] WN 154 (refd)

Legislation referred to

Rules of the High Court 1980 O 2 rr 1(1), (2), O 6 r 2, O 11 rr 1 (1), 4, 5 D

Appeal from: Suit No D1–22–1901 of 1989 (High Court, Kuala Lumpur)

Porres Royan (*Shook Lin & Bok*) for the appellant.
Cecil Abraham (*Shearn & Delamore*) for the respondent. E

Peh Swee Chin SCJ (delivering the grounds of judgment of the court): A short procedural point arose in this case about which there seems to be a conflict of judicial opinion in the High Court. We gave our judgment and now proceed to give our reasons in writing. F

The plaintiff as per its statement of claim has claimed damages for breach of contract of sale of rubber gloves allegedly bought by the second defendant as agent for the first defendant — a company incorporated in the United States of America (hereinafter 'the USA'), and therefore resident out of jurisdiction (the first defendant is hereinafter called 'the foreign defendant', the second defendant, 'the local defendant'). G

On a summons-in-chambers filed by the local defendant and heard ex parte before the learned registrar, the local defendant obtained an order (1) that the local defendant be at liberty to issue a third party notice against the foreign defendant; (2) that the local defendant be at liberty to serve the said third party notice on the foreign defendant at a specified address in New York, USA through the agents of the local defendant there; (3) that appearance be entered within 21 days etc and (4) for costs in the cause. H

The foreign defendant is the third party mentioned in the above action and the first defendant in this action.

The foreign defendant through local solicitors applied to the learned registrar for the above order to be set aside. The application was refused. I Against the said refusal, the foreign defendant appealed to the learned judge-in-chambers who dismissed the appeal, granting leave to appeal further to us.

A The relevant orders and rules of the High Court are set out below for ease of reference:

> Order 11 r 1(1) Where the writ does not contain any claim for damage, loss of life or personal injury arising out of — ... service of a notice of a writ out of the jurisdiction is permissible with the leave of the Court in the following cases, that
> B is to say —
> ...
> (f) if the action begun by writ is brought against a defendant to enforce, rescind, dissolve annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which —
> C ...
> (j) if the action begun by the writ being properly brought against a person duly served within the jurisdiction, a person out of the jurisdiction is a necessary or proper party thereto;
> ...
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> D Rule 4
>
> (1) An application for the grant of leave under rule 1 or 2 must be supported by an affidavit in Form 12 stating the grounds on which the application is made and that in the deponent's belief, the plaintiff has a good cause of action, and showing in what place or country the defendant is, or probably may be found.
> E ...
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> Rule 5
>
> (5) An official certificate stating that a notice of a writ as regards which rule 6 has been complied with has been served on a person personally, or in
> F accordance with the law of the country in which service was effected, on a specified date, being a certificate —
>
> (a) by a consular authority in that country; or
> (b) by the Government or judicial authorities of that country; or
> (c) by any other authority designed in respect of that country, under the Hague Convention,
>
> G shall be evidence of the facts as stated.
> ...
>
> Rule 6
>
> (2) Where in accordance with these rules notice of a writ is to be served on a
> H defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the High Court, the notice may be served —
> (a) through the Government of that country, where that Government is willing to effect service; or
> (b) through a Malaysian consular authority in that country, except where service through such an authority is contrary to the law of that country.
> I

Before dealing with the aforesaid procedural point in particular, two other issues were raised by the foreign defendant which should be briefly dealt with first.

The first issue was that nowhere in the supporting affidavit for the application for leave to issue the third party notice was set out the applicable relevant paragraphs as contained in O 11 r 1(1) set out above. It was submitted that two such paragraphs might be relevant and that they were para (f) and para (j) under O 11 r 1(1). In connection with para (f), it was submitted that the local defendant had not adduced evidence of how and when the contract was made, and that in regard to para (j), it was submitted that there was no evidence of where the contract was made between the local defendant and the foreign defendant or where the foreign defendant had committed the breach. It was submitted to the effect that even paras (j) and (f) did not apply.

While it is always far better to quote section and verse or specific order or rule in any application, it is never fatal to any application to omit to do so where the applicant can bring himself within any relevant specific order or rule. Here the local defendant could and did bring its case under paras (f) and (j) in question. The contract was made as alleged in the statement of claim by the second defendant resident within the jurisdiction allegedly as agent for the foreign defendant resident out of jurisdiction, and para (f) would seem to fit comfortably, and similarly as regards para (j), for the foreign defendant would seem in the circumstances of the case to be a necessary or proper party for third party procedure as any agent can indeed claim indemnity from his principal subject of course to proof of liability.

The second point was the failure of the local defendant to state in its affidavit supporting its application for leave to serve out of jurisdiction that in its belief, it had a good cause of action. In our view, this omission could not amount to anything more than a mere failure to comply with a rule of the High Court in regard to form and content of an affidavit, an irregularity curable by costs without any need for any amendment herein, vide O 2 rr 1(1) and (2) of the Rules of the High Court 1980. Costs to be dealt with later would be the only appropriate term to be imposed for allowing the proceeding to remain. In this connection, by virtue of the said O 2 rr 1(1) and (2), the case of *Kampong Kuantan Rubber Co Ltd v VKG Menon*[1] in so far as it decided that failure to state such belief that an applicant had a good cause of action would render an order for service out of jurisdiction invalid would now cease to be good law. It is to be borne in mind that the Rules of the Supreme Court 1957 applicable at the time of decision of *Kampong Kuantan*[1] did not have a similar provision like O 2 rr 1(1) and (2) aforesaid.

Order 2 rr 1(1) and (2) is set out below:

> 1(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> (2) Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceed-

A ings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

As regards the particular procedural point mentioned at the outset, it B concerns the actual method of service of the notice of the writ out of jurisdiction after an order of service out of jurisdiction is granted. This is provided by O 11 r 6 in particular, depending on whether or not there subsists the Civil Procedure Convention in that foreign country where the service out of jurisdiction is intended to be effected. In the instant appeal, it was common ground and we accepted that in the USA, there did not C subsist the Civil Procedure Convention, therefore O 11 r 6(2) applied. The service of the notice of writ herein would have to be effected through the Government of the USA or through our Malaysian consular authority contrary to what was ordered and done in this case, as stated above.

The rationale behind this prescribed method of service is of course that D our courts do not exercise their judicial powers beyond their territorial limits, and further service of judicial process in a foreign country, to use the grave words of Lord Denning in *Afro Continental Nigeria Ltd v The Meridian Shipping Co SA*[2] is an exercise of sovereignty in that country, which can only be done with the consent of that country.

Scrutton LJ in *Vaudrey v Nathan*,[3] when advising circumspection in E exercising power to allow service out of jurisdiction, opined that in some countries service out of jurisdiction to be effected there was looked upon with great disfavour.

It is possible that the Civil Procedure Convention if held or signed in future could contain methods of service less demanding on our foreign F missions than as set out in O 11 r 6(2), eg even by the method of service as ordered by the learned registrar and upheld by the learned judge, with our present world having shrunk in these days and times and boundaries of nations consequently having been regarded with a more realistic pitch of fever.

We therefore held that the part of the learned registrar's order providing G for service on the foreign defendant by the agents of the local defendant ought to be set aside.

To sum up, we therefore upheld the leave granted to issue the third party notice herein but set aside the service out of jurisdiction in question. Since the appellant (the foreign defendant) had succeeded on one out of two of its grounds of appeal, we decided that it should be awarded half the costs H here and in the court below.

Appeal allowed in part.

Reported by Prof Ahmad Ibrahim

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